MINTYE PROPERTIES SDN BHD

v.

YAYASAN MELAKA

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 22-119-99]
23 JUNE 2004

CONTRACT: *Construction - Sale and purchase agreement - Forfeiture clause - Deposit paid as "deposit and part payment" - Whether a true deposit - Whether forfeitable - Contracts Act 1950 ss. 64, 75*

CONTRACT: *Breach - Contract to purchase and develop land - Imposition of new condition after contract executed - Whether a variation - Whether within contemplation of parties - Plaintiff withdrawing from agreement after paying 60% of purchase price - Whether guilty of breach - Deposit paid - Whether forfeitable - Contracts Act 1950 ss. 64, 75*

By a sale and purchase agreement dated 27 November 1995 ('the agreement'), the plaintiff agreed to purchase a piece of land from the defendant statutory body ('the land') with a view to developing it into a housing project ('the project'). Having executed the agreement, the plaintiff paid 30% of the purchase price as "deposit and part payment", and a further 30% as "further payment". Disputes subsequently arose between the parties respecting a certain quota imposed on the project by the defendant at the instance of the State Government, wherefore the plaintiff withdrew from the agreement and demanded the return of the sum paid. The defendant alleged breach of contract, and in the circumstances invoked the forfeiture clause in the agreement and forfeited 10% of the purchase price amounting to RM3,330,858.90 ('the disputed sum'). Aggrieved, the plaintiff filed the present action to recover the disputed sum and raised before his lordship the following issues: (i) whether the disputed sum is a forfeitable deposit; (ii) whether its withdrawal from the project constituted a breach of the agreement; (iii) whether there was a unilateral variation by the defendant of the agreement; and (iv) whether ss. 64 and 75 of the Contracts Act 1950 ('the Act') applied in the present case.

Held (dismissing the claim):

[1] The plaintiff's reliance on s. 64 of the Act (waiver of performance) must be determined by reference to cl. 10 of the agreement. Clause 10, clearly, has excluded waiver of either party and required strict performance by the parties of the terms and conditions of the agreement. Section 64 therefore was of no assistance to the plaintiff. (p 452 c-f)

[2] By the recital to the agreement, the plaintiff intimated to the State Government and the defendant that it would purchase the land and undertake the project "upon all the terms and conditions hereinafter set out and appearing". In addition, cl. 1.1 stipulates that the purchase was "subject to all conditions of title whether express or implied, if any, affecting the land". Clearly, these conditions of title were sufficiently broad as to bring within their ambit and purview the imposition of the quota in respect of the title of the various lots comprised in the project. Further, by cl. 7(b), the plaintiff undertook to "comply with any and all Act, Ordinance, Enactment, Order, Rule, Regulation or Bye-laws affecting the said land and the development on the said land" – indicating that the quota had always been within the actual contemplation of the parties. There was therefore no merit in the contention that agreement had been varied by the defendant. (pp 452 g-h & 453 a-d)

[3] The plaintiff's intimation of the absence of interest in proceeding with the project, and its withdrawal from the project, had triggered off cl. 2 of the agreement, which obligated the plaintiff to pay the consideration of RM3,330,858.90. Since the plaintiff had merely paid a deposit and part payment amounting to 60% of the consideration, with no intention of paying the balance, there was a default by the plaintiff in complying with cl. 2. For such breach, the defendant was entitled to invoke cl. 9.1 to determine the agreement and forfeit the disputed sum. (p 453 e)

[4] There could be no doubt that the 30% paid as "deposit and part payment" was paid as a true deposit. Hence, it had always been the intention of the parties that the 30% of the purchase price was a true deposit which was forfeitable. A *fortiori*, the disputed sum being 10% of the said 30%, it was affirmatively a forfeitable deposit in the light of cls. 2(a) and 9.1 of the agreement. (p 454 f-h)

[5] Since the contract was broken by the plaintiff, and a sum was named in the contract as being payable (cl. 9.1) for such breach, the defendant, as the party complaining of the breach, was entitled, whether or not actual

damages or loss had been proved to have been caused thereby, to receive from the plaintiff reasonable compensation not exceeding the amount named, ie not exceeding 10% of the purchase price. The forfeiture did not constitute a claim for damages, as indeed there was no such claim by the defendant against the plaintiff. Section 75, therefore, did not provide the plaintiff with a relief against forfeiture. (pp 456 c & 457 f)

Case(s) referred to:

Associated Pan Malaysia Cement Sdn Bhd v. Syarikat Teknikal & Kejuruteraan Sdn Bhd [1990] 1 CLJ (Rep) 15 ***(refd)***

Bhai Panna Singh & Ors v. Bhai Arjun Singh & Ors [1929] AIR 179 ***(refd)***

Birmingham District Land Company v. London and North Western Railway Company [1889] 40 Ch D 268 ***(refd)***

Cowey v. Liberian Operations, Ltd [1966] 2 LLLR 45 ***(refd)***

Electoms Sdn Bhd v. Internet Technology Asia Ventures Sdn Bhd [2002] 8 CLJ 253 ***(refd)***

Fateh Chand v. Balkishan Dass [1963] AIR 1405 ***(refd)***

Hadley v. Baxendale [1854] 9 Exch 341 ***(refd)***

HG Warren v. Tay Say Geok & Ors [1965] 31 MLJ 44 ***(refd)***

K Umar Kandha Rajah v. EL Magness [1985] 1 MLJ 116 ***(refd)***

Karuppiah v. Petaling Garden Co Sdn Bhd [1972] 1 MLJ 173 ***(refd)***

Kerpa Singh v. Bariam Singh [1966] 1 MLJ 38 ***(refd)***

Linggi Plantations Ltd v. Jagathesan [1972] 1 MLJ 89 ***(refd)***

Mayson v. Clouet & Another [1924] AC 980 PC ***(refd)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 1 MLJ 577 ***(refd)***

Oriental Bank Bhd v. Phung Kim Choy [2001] LNS 144 ***(refd)***

Pan Ah Ba & Anor v. Nanyang Construction Sdn Bhd [1969] 2 MLJ 181 ***(refd)***

Reliance Shipping & Travel Agencies v. Low Ban Siong [1996] 2 CLJ 960 CA ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 375 FC ***(refd)***

Sim Siok Eng v. Government of Malaysia [1978] 1 MLJ 15 ***(refd)***

Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd [1987] 2 CLJ 423 SC ***(refd)***

S.S. Maniam v. The State of Perak [1957] MLJ 75 ***(refd)***

Thomas Hughes v. The Directors & c., of the Metropolitan Railway Company [1877] 2 AC 439 ***(refd)***

Wong Kup Sing v. Jeram Rubber Estates Ltd [1969] 1 MLJ 245 ***(refd)***

Yee Chee Pang v. Wong Nam Sang Enterprise Sdn Bhd [1988] 2 MLJ 817 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 64, 75

For the plaintiff - Cyrus Das (T Sudhar & Kelvin Chow); M/s Allen, Gledhill & Ball
For the defendant - Muhammad Naguib Ahmand; M/s Abu Seman & Co

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Plaintiff's Claim

The plaintiff's claim is to recover a sum of RM3,330,858.90 forfeited by the defendant *vide* its letter of 4 June 1998 ("the disputed sum") together with interest at the rate of 8% per annum from 6 January 1999 to the date of realization, and costs.

The plaintiff's grounds are:

1. There was no breach by the plaintiff of the sale and purchase agreement;
2. The disputed sum is not a forfeitable deposit;
3. Section 75 of the Contracts Act 1950 applies; and
4. The forfeiture was unconscionable in law.

Unless the context otherwise requires, a reference hereinafter to a clause is a reference to that clause in the agreement; and a reference to a section is a reference to that section in the Contracts Act 1950.

Factual Background

The defendant is a statutory body established under the Malacca Foundation Enactment 1984.

By a principal agreement and a supplementary agreement, both dated 27 November 1995, the defendant sold to the plaintiff 147.05 acres of land in Bachang, Melaka ("the land") at a consideration of RM33,308,589.00 for development purposes ("the project").

The principal agreement shall be referred to hereinafter as "the agreement".

The supplementary agreement which excluded 27.38 acres from the sale did not in effect raise any controversy.

The plaintiff had in accordance with cl. 2 paid the defendant RM19,985,153.40 being:

(a) 30% of the Purchase Price as deposit and part payment of the full Purchase Price; and

(b) 30% of the Purchase Price as further payment of the Purchase Price.

By a letter dated 29 May 1996, the defendant informed the plaintiff that the EXCO had decided to impose a 100% Bumiputra quota ("the quota") in respect of sales under the project and gave the plaintiff two weeks to inform the defendant if the plaintiff was still interested in continuing with the development of the land. The recital in the agreement expressly referred to the purchase of the land for the purposes of development of the project ie, 'development into building and commercial/industrial purpose'.

By a letter dated 10 June 1996, the plaintiff requested for an extension of time to hold an extraordinary general meeting ("the EGM") to obtain its shareholders' views before making a decision in respect of the above.

By a letter dated 4 July 1996, the defendant agreed to grant the plaintiff an extension of one month from 4 July 1996.

By a letter dated 31 July 1996, the plaintiff requested for a further extension of time to hold the EGM.

By a letter dated 14 August 1996, the defendant granted the plaintiff a further extension of one month from 14 August 1996 and stated that in the event the plaintiff should fail to hold the EGM by then, the defendant would assume that the plaintiff was no longer interested to continue with the project.

By a letter dated 14 August 1996, the plaintiff appealed to the defendant to have the quota reduced according to the plaintiff's proposal as therein contained.

By a letter dated 10 September 1996, the plaintiff informed the defendant that the plaintiff was willing to carry out and complete the project in the event its appeal for reduction of the quota was accepted by the EXCO.

As the plaintiff's appeal was pending, the plaintiff did not hold the EGM.

The defendant by a letter dated 3 October 1996 informed the plaintiff that the plaintiff's appeal and proposal had been forwarded to the relevant authorities for consideration.

By a letter dated 29 October 1997, the defendant informed the plaintiff that the quota had been reduced as set out in the letter dated 22 October 1997 from the Melaka Tengah District and Land Office. However, the reduction was not to the extent requested by the plaintiff.

By a letter dated 10 November 1997, the plaintiff appealed again to have the quota reduced according to the plaintiff's proposal as contained therein.

There was no reply to the plaintiff's letter dated 10 November 1997.

By a letter dated 10 December 1997, the plaintiff informed the defendant that it was not interested in proceeding with the project and claimed that it had accepted the defendant's offer to withdraw from the project and asked for a refund of RM19,985,153.40 paid by the plaintiff to the defendant under the agreement.

At this juncture, it is pertinent to point out that the plaintiff was unable to refer to any evidence to the effect that the defendant has offered to withdraw from the project.

In the letter dated 9 February 1998, the defendant informed the plaintiff that the defendant would be looking into the plaintiff's withdrawal from the project and the legal effect and implications. In reply thereto, the plaintiff *vide* letter dated 14 February 1998 stated that the withdrawal was not proposed by it but was its acceptance of the defendant's offer. Again, the plaintiff's allegation pertaining to the defendant's offer to withdraw from the project was not supported by any document or other evidence.

By a letter dated 4 June 1998, the defendant informed the plaintiff of the defendant's decision to rescind the agreement and forfeit the disputed sum under cl. 9.1.

The plaintiff *vide* letter dated 23 December 1998 to the defendant demanded for the refund of the disputed sum.

Submissions By Parties And Decision Of Court

Breach Of Agreement

Learned counsel Dato Dr. Cyrus Das, assisted by En. T. Sudhar and En. Kelvin Chow submitted for the plaintiff that there was no breach of agreement to justify forfeiture of the disputed sum nor could cl. 9.1 be invoked, since the plaintiff as purchaser has all along complied with the agreement as regards payment of the purchase price.

They added that the imposition of the quota was not provided for in the agreement and was a unilateral stipulation amounting in law to a variation of the contract, on the basis of *Cowey v. Liberian Operations, Ltd.* [1966] 2 LLLR 45.

They said that where after entry into a contract, during the time of performance, the contracting parties are re-discussing whether the contract should go forward or be abandoned, all stipulations in the contract as to time to be of the essence, ceases to be so, relying on *Wong Kup Sing v. Jeram Rubber Estates Ltd.* [1969] 1 MLJ 245.

It was also stressed for the plaintiff that equity steps in to prevent by estoppel a party from enforcing contractual rights which by its conduct it has led the other to believe that they were being suspended or kept in abeyance, seeking support from *Thomas Hughes v. The Directors & c., of the Metropolitan Railway Company* [1877] 2 AC 439 HL; *Birmingham District Land Company v. London and North Western Railway Company* [1889] 40 Ch. D. 268; and *Sim Siok Eng v. Government of Malaysia* [1978] 1 MLJ 15 FC.

The plaintiff invoked s. 64 to say that if the conduct of the parties was such as to dispense altogether or in part with performance, neither party may fall back on the existing contract without due notice. It was argued that in the instant case, the notice to the plaintiff to choose whether to proceed with the sale and subsequent discussions between the parties constituted a dispensation of performance when the plaintiff opted not to proceed: *Pan Ah Ba & Anor. v. Nanyang Construction Sdn Bhd* [1969] 2 MLJ 181 FC.

En. Muhammad Naguib Ahmad, learned counsel for the defendant, contended that the reason for the forfeiture of the disputed sum was stated in the defendant's letter dated 4 June 1998 and summarized in the amended statement of defence. He added that the rights and obligations of the parties are contained in the agreement, to which there was no variation, and that under cl. 10, there was no waiver of the terms thereof.

It was stated for the defendant that since the plaintiff was not interested in proceeding with the project, none of the authorities cited for the plaintiff is of any use to the plaintiff.

At this stage, it is appropriate for me to consider some of the authorities cited for the plaintiff.

In *Cowey, supra,* the Mayor's and City of London Court was concerned with a contract of employment, which, unlike the agreement before me, contains vastly different clauses. I am unable to find anything of assistance to the plaintiff's case herein.

Next, the plaintiff relied on *Wong Kup Sing, supra,* which is a claim for specific performance of an agreement of sale of a rubber estate entered into between the plaintiff and the defendants, or in the alternative for damages or rescission of the contract. It is to be observed that the facts there clearly do not concern the forfeiture of 10% of the purchase price which formed an integral part of the deposit and part payment, after the plaintiff's intimation that the plaintiff was not interested in proceeding with the project.

The judgment of the House of Lords in *Hughes, supra,* cited for the plaintiff, revolves around, *inter alia,* the application of equity as follows:

> Where a notice to repair has been given, and the lessee makes an offer to sell his interest in the premises, and a negotiation takes place on that offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of the notice can properly be calculated. Equity will relieve against an ejectment founded on the original notice.

This dictum was followed by Lee Hun Hoe CJ (Borneo) and Raja Azlan Shah FJ (now HRH Sultan of Perak) in *Sim Siok Eng, supra*

It is pertinent to point out that *Hughes, supra,* and *Sim Siok Eng, supra,* do not concern the construction of the agreement which, *inter alia*, provides for the exclusion of waiver in cl. 10 which requires strict performance of the terms and conditions of the agreement. I shall revert to cl. 10 later in my judgment.

Section 64, on which the plaintiff relies, reads:

> Every promise may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Section 64 materially alters the English doctrine of accord and satisfaction, as to the right of a party to take advantage of a release made for his benefit: per Abdul Aziz J in *Kerpa Singh v. Bariam Singh* [1966] 1 MLJ 38.

Section 64 represents a departure from the common law of England and is similar to the Indian law on the general principles of waiver under which it is open to a promiseee to dispense with or remit wholly or in part the performance of the promise made to him or he can accept any promise which he thinks fit, and under Malaysian law neither consideration nor an agreement is necessary: per Gunn Chit Tuan SCJ (later CJ (M) in *Associated Pan*

Malaysia Cement Sdn Bhd v. Syarikat Teknikal & Kejuruteraan Sdn Bhd [1990] 1 CLJ (Rep) 15; and *Oriental Bank Bhd v. Phung Kim Choy* [2001] LNS 144 per Kang Hwee Gee J.

Under s. 64, as well as the common law, parties to a contract are quite free to vary the performance of their contract by modifying or varying its terms by mutual consent thereby affording the parties some flexibility in the performance of their obligations: per Kang Hwee Gee J in *Electoms Sdn Bhd v. Internet Technology Asia Ventures Sdn Bhd* [2002] 8 CLJ 253.

In my view, the principles enunciated in the above judgments are trite. However, the plaintiff's reliance on s. 64 in particular waiver on the part of the defendant must be determined by reference to cl. 10 which merits reproduction as follows:

EXCLUSION OF WAIVER

10. Knowledge or acquiescence by either party hereto or in any breach of any of the conditions or covenants herein contained shall not operate as or be deemed to be a waiver of such conditions or covenants or any of them and notwithstanding such knowledge or acquiescence the parties hereto shall be entitled to exercise their respective rights under this Agreement and to require strict performance by the other of the terms and conditions herein contained.

As stated above, cl. 10 excludes waiver of either party and requires strict performance by the parties of the terms and conditions of the agreement.

In the circumstances, I hold that s. 64 is of no assistance to the plaintiff.

The determination of the issue of whether there is a breach of the agreement by the plaintiff must be achieved by construing the agreement as a whole.

Upon a true construction of the agreement, I find that in the recital the plaintiff has expressly intimated to the State Government and the defendant its willingness to undertake the development of the project and of purchasing the land "for development into building and commercial/industrial purposes and upon all the terms and conditions hereinafter set out and appearing".

Clause 1.1 expressly provides for the purchase of the land "subject to all conditions of title whether express or implied, if any affecting the said lands subject to the terms hereinafter contained".

In my view, since the purchase of the land is subject to all conditions of title affecting the said land under cl. 1.1, such conditions of title are sufficiently broad to bring within its ambit and purview the imposition of the quota in respect of the title of the various lots comprised in the project.

Clause 6(g) stipulates, *inter alia*, the plaintiff's obligations to bear "all costs and expenses incurred for the approval of the layout plan and subdivision pertaining to the overall development of the land.".

Clause 7(b) contains the plaintiff's undertaking to "comply with any and all Act, Ordinance, Enactment, Order, Rule, Regulation or Bye-Laws affecting the said Lands and the development on the said Lands.".

There is absolutely no doubt that the quota has always been within the actual contemplation of the parties herein as reflected in the aforesaid clauses of the agreement. As such, I am unable to uphold the plaintiff's contention that there was a variation of the agreement.

The plaintiff's intimation of the absence of interest in proceeding with the project and hence its withdrawal therefrom on 10 December 1997 would trigger off the full vigour of cl. 2 which stipulates the plaintiff's obligation in the payment of the consideration of RM33,308,589. Since the plaintiff has merely made a deposit and part payment of 30% of the purchase price and then another 30%, amounting to 60% of the consideration, with no intention of paying the balance thereof in any event and under any circumstance whatsoever as a result of the plaintiff "not interested in proceeding with the project", it seems clear to me that there is a default by the plaintiff in complying with the express provision of cl. 2 ie, in making payment of the balance of the purchase price, as a result of which the defendant is entitled to invoke cl. 9.1 which where relevant reads:

DEFAULT

> 9.1 In the event that the Purchaser defaults in making any payment of the balance of the Purchase Price, herein within the time stipulated in this Agreement ... the Corporation may at its absolute discretion determine this Agreement and a sum equivalent to ten per centum (10%) of the Purchase Price shall be forfeited to the Corporation absolutely as agreed liquidated damages and the Corporation shall forthwith refund to the Purchaser all other monies paid herein free of interest and thereafter the Corporation shall be entitled to deal and/or otherwise dispose of the said Lands or any part thereof to any persons without any liability to account to the Purchaser. Upon the determination of this Agreement no party shall have any claims whatsoever against the other party.

Further, it is imperative to reiterate that the exclusion of waiver under cl. 10 specifically requires strict performance by the parties thereto.

In the circumstances, I hold that the plaintiff is in breach of the agreement.

Is The Disputed Sum Forfeitable Deposit?

The plaintiff and the defendant share a common ground that the forfeiture is valid provided it is a true deposit, referring to *Linggi Plantations Ltd v. Jagathesa*n [1972] 1 MLJ 89; and *Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn. Bhd.* [1987] 2 CLJ 423 SC; *H.G. Warren v. Tay Say Geok & Ors* [1965] 31 MLJ 44 PC; *Karuppiah v. Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 173 FC.

This leads me to the question as to whether, on the facts and upon a true construction of the agreement, the disputed sum is a forfeitable deposit.

The Federal Court in a majority judgment delivered by Edgar Joseph Jr FCJ (as he then was) in *Morello Sdn Bhd, supra,* held, *inter alia,* that whether money has been paid by way of deposit or part payment, the court must have regard to the terms of the agreement as a whole and the surrounding circumstances, and that considerable weight is to be given to the label attached to the initial payment by the parties.

In my judgment, it is to be noted that under cl. 2(a), the sum of RM9,992,576.70 has been paid by the plaintiff to the defendant as "deposit and part payment", being 30% of the full purchase price for the land. From the expression used in cl. 2(a) ie, "deposit and part payment", it is explicit that the parties herein have agreed that the 30% was paid as a true deposit and such deposit was to be taken into account as part payment ie, 30% of the full purchase price for the land so that the completion of the agreement is to be effected by the plaintiff by way of a payment of the balance ie, 70% of the purchase price. There can be no doubt that the 30% was paid as true deposit, as has been expressly stated as deposit and part payment of the full purchase price.

Hence, it is my finding that it has always been the intention of the plaintiff and the defendant who are the parties to the agreement that the 30% of the purchase price is a true deposit which is forfeitable. A *fortiori,* the disputed sum being 10% of the said 30% is affirmatively a forfeitable deposit in the light of cls. 2(a) and 9.1.

3. Section 75 Contracts Act 1950

It was submitted for the plaintiff that s. 75 applies and that the forfeiture is bad in law, relying on *Mayson v. Clouet and Another* [1924] AC 980 PC.

In contending that it is necessary to distinguish between forfeitable earnest money or deposit on the one hand and non-forfeitable purchase price on the other, *Bhai Panna Singh and Others v. Bhai Arjun Singh and Others* [1929] AIR 179 PC; and *Fateh Chand v. Balkishan Dass* [1963] AIR 1405 SC, were relied upon. The plaintiff stressed that there is a distinction between "deposit and part payment", in cl. 2(a) and "agreed liquidated damages", in cl. 9.1 citing in support *Morello Sdn Bhd v. Jaques (International) Sdn. Bhd.* [1995] 1 MLJ 577 FC; and *Yee Chee Pang v. Wong Nam Sang Enterprise Sdn Bhd* [1988] 2 MLJ 57 SC.

It was also contended for the plaintiff that s. 75 prevents a recovery of damages which would have to be proved. Support was sought in *Bhai Panna Singh, supra; Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 375 FC; *Reliance Shipping & Travel Agencies v. Low Ban Siong* [1996] 2 CLJ 960 CA.

I shall consider *Mayson, supra,* first, where the contract for the sale of land stipulated that a deposit should be paid immediately, that two instalments of cash, being 10% of the rest of the agreed price, should be paid at certain dates, and that the balance of the price should be paid within 10 days of the production of a certificate that certain buildings upon the land were completed; if the purchaser failed to comply with the conditions of the contract his deposit might be forfeited and the land resold. The purchaser paid the deposit and the two instalments, but failed to pay the balance of the price at the stipulated time. The vendor rescinded the contract. In an action claiming a return of the instalments paid, the Privy Council held that the rights of the parties depended upon the contract; and that although the purchaser was in default, the instalments were recoverable, since the contract distinguished between the deposit and the instalments and provided for a forfeiture of the deposit only.

The judgment of the Privy Council advised at p. 987 that cl. 13 there dealt with what was to happen if the purchaser was in default ie, the deposit was forfeited.

In my view, the judgment of Privy Council supports the plaintiff's forfeiture of the 10% of the purchase price of which the deposit and part payment under cl. 2(a) was an integral part.

The importance of s. 75 merits reproduction as follows:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage of loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for.

The plaintiff's reliance on s. 75 has indeed confirmed my aforesaid finding that there was a breach of the agreement by the plaintiff. Since the contract had been broken by the plaintiff, and a sum has been named in the contract ie, cl. 9.1, as the amount to be paid in case of such breach, the defendant as the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the plaintiff as the party who has broken the contract, reasonable compensation not exceeding the amount so named ie, 10% of the purchase price.

The defendant in the case before me is not claiming for damages against the plaintiff and so *Bhai Panna Singh, supra,* which concerns a claim by the vendors for damages for breach of contract of sale could be of no assistance to the plaintiff herein.

In *Fateh Chand, supra,* the Supreme Court of India gave a detailed exposition of s. 74 of the Indian Contract Act 1872 (= s. 75) as follows:

(a) It eliminates the common law distinction between the enforceability of liquidated damages and non-enforceability of a penalty and so both liquidated damages and penalty are enforceable under s. 75. See also *Selva Kumar, supra* FC; *S.S. Maniam v. The State of Perak* [1957] MLJ 75; *Linggi Plantations, PC, supra.*

(b) The measure of damages in the case of a breach of a stipulation by way of a penalty is by s. 75 reasonable compensation not exceeding the penalty stipulated for, and the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach.

Section 75 was considered by the Federal Court in *Selva Kumar, supra*, where the parties entered into an agreement to purchase a clinic for RM120,000 of which a sum of RM12,000 was paid on signing the agreement, thereafter a further sum of RM48,000 was paid, leaving the balance of RM60,000 to be paid by monthly instalments at RM4,000 each for 15 months. A total sum of RM96,000 was paid but the appellant as buyer refused to pay the balance. The respondent as vendor forfeited the entire sum of RM96,000 and the forfeiture was upheld by the High Court.

On appeal, the Federal Court held that only the sum of RM12,000 was forfeitable as earnest money or deposit and ordered the refund of RM84,000 to the appellant, the buyer. Peh Swee Chin FCJ, in delivering the judgment of the court, held that the plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v. Baxendale* [1854] 9 Exch 341.

The Federal Court judgment in *Selva Kumar, supra*, supports the defendant's forfeiture of the disputed sum since, as alluded to above, the forfeiture by the defendant did not constitute a claim for damages, as indeed there was no such claim by the defendant against the plaintiff.

Selva Kumar, supra, was followed by the Court of Appeal in *Reliance Shipping, supra*. Siti Norma Yaakob JCA (now FCJ) in delivering judgment for the Court of Appeal held, *inter alia*, that a clause in an agreement falling within s. 75 must be subject to the court's determination that such agreed damages is reasonable compensation for the injured party.

Applying *Selva Kumar*, FC, *supra*, and *Reliance Shipping, supra*, to the facts of this case and upon a true construction of the agreement, I hold that s. 75 does not provide the plaintiff with a relief against forfeiture.

Is The Forfeiture Unconscionable?

The plaintiff submitted that the forfeiture was unconscionable in that the imposition of the quota after the entry into the agreement has led to the plaintiff's withdrawal from the agreement, when the defendant's chairman and members of the Board were also the Chief Minister and most of the State Executive Councillors. *K. Umar Kandha Rajah v. EL Magness* [1985] 1 MLJ 116 was cited in support.

For the defendant, it was contended that under the agreement, the plaintiff has intimated to the State Government and the defendant its willingness to undertake the development of the land.

In *K Umar, supra,* there was a condition precedent in the sale and purchase agreement executed by the parties thereto that the purchaser should retain the title deeds before the purchase price was paid in full, but the vendor has not complied therewith. Apart from paying the first instalment and subsequent two sums of RM1,000 to the vendor, the purchaser refused to pay the second instalment. The vendor terminated the agreement and forfeited the sum of RM5,000 deposit. The Federal Court in the judgment delivered by Syed Agil Barakbah FJ (as he then was) held, *inter alia*, in the circumstances, it would be unconscionable to allow the deposit to be forfeited by the vendor and it was just and equitable for the money to be returned to the purchaser.

It is to be noted that the Federal Court was not called upon to construe aforesaid clauses of the agreement for determination by me.

On my part, the answer to this issue of forfeiture of the disputed sum is to be ascertained by reference to the provisions of the agreement in its entirety which I have considered above.

Upon a true construction of the agreement, in particular the clauses which were considered earlier in this judgment, I am unable to accept the plaintiff's contention that the forfeiture is unconscionable.

Conclusion

On the foregoing grounds, I dismiss the plaintiff's claim with costs.